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IN THE

Supreme Court of the United States,

OF THE OCTOBER TERM, A. D. 1900.

E. T. WILSON, RECEIVER OF THE FIRST NATIONAL BANK OF HELENA, MONTANA,
Plaintiff in Error,
vs.
THE MERCHANTS LOAN AND TRUST COMPANY OF CHICAGO, ILLINOIS,
Defendant in Error.

Error to the United States Circuit Court of Appeals for the Seventh Circuit.

290.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

JOHN N. JEWETT,
For Defendant in Error.

BARNARD & MILLER, PRINT.

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STATEMENT OF CASE.

The parties to this litigation have not changed their relations to each other since the action was commenced, and may, therefore, be referred to as plaintiff and defendant without danger of confusion. Reference to the record will mean the printed record.

The action was commenced in the District Court of the United States for the Northern District of Illinois, Eastern Division, against P. C. Peterson and The Merchants' Loan and Trust Company, to recover an assessment made by James H. Eccles, as Comptroller of the Currency, upon stockholders in the First National Bank of Helena, Montana, upon an averment in the declaration (Rec., 2) that Peterson "appeared by the books of

the said The First National Bank of Helena, Montana, to be the owner and holder of one hundred and twenty (120) shares of stock in said bank, which said stock, however, was held by him for the sole use and benefit of the defendant, The Merchants Loan and Trust Company * * * said Peterson being one of its employes."

Afterwards the action was dismissed as to the defendant, Peterson (Abst., 3), and by leave of court an amended declaration was filed (Rec., 4) against The Merchants Loan and Trust Company alone, which after reciting the failure and suspension of The First National Bank of Helena, the appointment and qualification of the plaintiff as receiver, the making of the assessment of $100 per share by the Comptroller upon the shareholders of the bank, " Avers, that the Merchants Loan and Trust " Company, a corporation, at some time between the " 1st day of December, 1894, and the 1st day of June, " 1895 (the exact date being to plaintiff unknown), *pur-* " *chased and became the owner* of 120 shares of the " capital stock of the said First National Bank of Hel- " ena, Montana, of the par value of one hundred dol- " lars each, and continued to be and was at the time " said bank suspended and ceased to do business, *the* " *real owner of the same.* But *in order to evade the* " *responsibility* imposed by law upon the stockholders " in said bank, caused said shares to be placed upon the " books of said bank in the name of P. C. Peterson, " one of its employes, in whose name said shares ap- " peared on the said books at the time of said failure." Then follows an averment that Peterson was not personally responsible, and that notice of the assessment and demand for its payment were served upon Peterson with the knowledge of the defendant, and the conclusion of the

declaration is that *by reason of the premises* The Merchants Loan and Trust Company, *as owner*, is under legal obligation to pay $12,000 as an assessment upon the stock of The First National Bank of Helena which stood at the time of the suspension of said bank in the name of Peterson.

To this declaration these pleas were filed (Rec., 6):

1st. Nil debit.

2d. A denial that the defendant, between the 1st day of December, 1894, and the 1st day of June, 1895, *or at any other time*, purchased or became the owner of 120 shares of the capital stock of The First National Bank of Helena, *or any shares* of the capital stock of said bank.

3d. That the 120 shares of the First National Bank of Helena are and at all times have been held in the name of said P. C. Peteron, as trustee, and as security for the payment of the principal and interest of a note for $12,000, dated April 15, 1893, and payable to the order of defendant on August 16th, after date thereof, made and executed for value received by one Shirley C. Ashby to the defendant, and bearing interest, after maturity, at the rate of 7 per cent. per annum, which note has ever since been held and owned by defendant, and on which only a partial payment had been made.

Issue was joined on the first and second pleas, and to the third plea a special replication was filed (Rec., 7), averring that the 120 shares of stock in the First National Bank of Helena, mentioned in the plea, were not held by said Peterson as security for the payment of the note referred to, *but the defendant was and still is the real owner of said stock.*

By these pleadings, the issue to be determined is sharply defined, and that issue was a question of fact, viz: was the defendant the real owner of the 120 shares of stock within the meaning of the National Banking Act? If it should be said in the loose language of some courts and many writers upon judicial subjects, that it was a *mixed* question of law and fact, it may be pertinently replied that the question of fact must in every such case be first determined, before the theories of law can be properly invoked for the determination of results.

The case was submitted to the District Court upon a stipulation of the parties named in the record; "a statement of facts" which was used on the trial without objection or exception and is embodied in the record as a "*bill of exceptions*." The stipulation was the only evidence. The District Court (Rec., 8) found the issues for the defendant, and rendered judgment against the plaintiff for costs. The finding of the court was a general one, and no opinion or reasons of the court were reduced to writing and filed in the case. On the same day the plaintiff filed a motion for a new trial (Rec., 9), the sole ground for the motion being, that "The court erred in finding the issues "in favor of the defendant and against the plaintiff." The overruling of the motion, with an exception thereto by the plaintiff, is embodied in the order for judgment. (Rec., 8.) These proceedings took place on the 18th of April, 1899.

No objections or exceptions were taken on either side to the stipulation of the parties, which is designated in the record "statement of facts." or to anything which that stipulation contained, and on the 13th day of May, 1899 (Rec., 9), "the statement of facts * * * was allowed as a bill of exceptions."

Upon a record made up of the orders and proceedings above referred to, and the stipulation of the parties designated "statement of facts," as a bill of exceptions, the plaintiff by petition took the case to the Circuit Court of Appeals for the 7th Circuit, assigning for error (Rec., 29):

1st. The court erred in finding the issues in favor of the defendant.

2d. The court erred in overruling motion of plaintiff for a new trial.

3d. The court erred in entering judgment in favor of the defendant and against the plaintiff.

Upon the hearing of the cause in the Circuit Court of Appeals (Rec., 40) the judgment of the District Court was affirmed, and from that judgment the present writ of error is prosecuted.

Whether or not there is anything in this assignment of errors which this court can and will consider, is a matter to be presented hereafter; but it will be well to understand the contents of the stipulation or "statement of facts" before that discussion is entered upon.

That stipulation, by whatever name it may be described, consists of two parts: 1st. Substantive facts, which are admitted as such, and 2d, letters and other memoranda attached as exhibits, the genuineness and competency of which as evidence only are admitted, but the effect of which is to be determined by the court. The actual stipulation is found on pages 9 to 13 of the record. The exhibits admitted merely as evidence, are set out in the fifteen pages immediately following.

An analysis of the statement shows these facts, viz: That on April 15, 1893, the defendant loaned to Shirley

C. Ashby, of Helena, Montana, then President of the Helena National Bank, $12,000, for which amount it took his promissory note, payable on the 16th day of August next following. That as security for the payment of said note Ashby assigned in blank and delivered to defendant a certificate representing 150 shares of the capital stock of the Helena National Bank. That the note was in form commonly known as a collateral note and authorized the sale of the security upon default in payment of the note. That so far as known to defendant, the Helena National Bank was then in good financial condition, That before the maturity of the note and on July 26, 1893, Ashby made an assignment for the benefit of his creditors, to Robert S. Ford of Grant Falls, Montana, and amongst the property assigned by him was a certificate for 150 shares of the capital stock of the Helena National Bank, described as "then held by the "Merchants Loan and Trust Company *in pledge.*"

About the time of his assignment Ashby resigned the presidency of the Helena National Bank, and E. D. Edgerton was chosen to fill the vacancy. The cashier, Frank Baird, continued in that office until the summer of 1894, and was then succeeded by George F. Cope (Rec., 10). Meanwhile the conditions, so far as they related to the note and collateral, remained unchanged. The note of Ashby was wholly unpaid, and the certificate for 150 shares of stock in the Helena National Bank was held without change by the defendant.

The stipulation as a statement of fact admits (Rec., 10, 11) that "Later in the year 1894, it was proposed "by the parties in interest, at Helena, to consolidate the "Helena National Bank with the First National Bank "of Helena, of which the defendant had notice, and in

"response to a letter from Edgerton, President of the "Helena National Bank," dated December 22, 1894 (Rec., 11), the defendant forwarded to him the certificates for 150 shares of stock in the Helena National Bank which it held as collateral security, and the letter, enclosing said certificate, was received and acknowledged.

An understanding of the situation as it then was, requires that the letters relating to it should be here set out. They are Exhibits E, F, G and H, of the Stipulation (Rec., 23-4-5).

EXHIBIT E.

THE MERCHANTS' LOAN & TRUST COMPANY,

CHICAGO, Dec. 17th, 1894.

Geo. F. Cope, Esq., Cashier, Helena, Mont.

DEAR SIR: Your favor of the 13th inst. duly received. We will in future send all our collections to the First National Bank of Helena. Thanks for the printed circular regarding the consolidation of the Helena National Bank with the First National. We would like to know how we stand in this matter. You know we hold 150 shares of the Helena National Bank stock as collateral to a note made by S. C. Ashby. What is it necessary for us to do? How many shares of the First National Bank stock do we receive for the 150 shares of the Helena National? Is there a market for the new stock? Please give us what information you can, that we may proceed correctly, and oblige

Yours, truly,

ORSON SMITH, *V. Pt.*

EXHIBIT F.

FIRST NATIONAL BANK,
Designated Depository of the United States,
Capital and Surplus, $1,000,000.

HELENA, Montana, Dec. 22, 1894.

Orson Smith, Vice-President
Merchants' Loan & Trust Co., Chicago, Illinois.

DEAR SIR: Your favor of Dec. 17th to our Mr. Cope received. I never knew exactly how your matter with Mr. Ashby stood, and am pleased to have the information. The new stock in the consolidated deal will be transferred on the same basis as held by the stockholders in the Helena National; but it is only fair to call your attention *to the fact* that during the last three months the Comptroller of the Currency, at our request, owing to Mr. Ashby's peculiar methods of business and large indebtedness to the bank, has reduced the capital of the Helena National from $500,000 to $400,000. Consequently your 150 shares of the Helena National stock will be re-issued to you in the same amount less twenty per cent.

Inasmuch as we want to have matters as unanimous as possible, would it not be well for you to send in your stock and have it transferred to your own name or whatever name you may elect, and send us your proxy to vote at the meeting in January regarding the consolidation?

We have considerably more than enough stock represented now to carry the matter, so you may know it is no selfish motive that prompts this suggestion, but rather for your own interest.

You understand Mr. Ashby is under an assignment and Lord knows what not, and he has proven to be anything but a desirable party in *my* (any?) capacity of life, that I know of.

You ask, if there is a market for the new stock. I suppose you understand just how the West is at this time. We have no great amount of surplus money. I apprehend that there will be a market for the new stock, but just at the present time I don't know that I could refer you to any one. You understand that there are lots of western parties who would dispose of their western holdings, *at any price;* and the truth is that the West is not quite able to take them all at once. Any information, that you may desire in the future, I shall be most happy to supply if it is within my power.

Respectfully,

E. D. EDGERTON,
President Helena Natl. Bk.

EXHIBIT G.

THE MERCHANTS' LOAN & TRUST COMPANY.

CHICAGO, Dec. 26, 1894.

E. D. Edgerton, Esq.,
President of Helena National Bank,
Helena, Mont.

DEAR SIR: I enclose herewith certificates of stock for 150 shares, for which please send me two certificates of fifty shares each, and one for twenty shares in the name of P. C. Peterson. Mr. Peterson's address is, Care of this Bank, and we will be glad to furnish you proxies if you will enclose us blanks for that purpose.

Where can Mr. Ashby be found? In a matter of this

kind we would like very much to have him consent to our action.

Yours truly,

ORSON SMITH, *V. Pt.*

EXHIBIT H.

FIRST NATIONAL BANK,
DESIGNATED DEPOSITORY OF UNITED STATES.
CAPITAL AND SURPLUS $1,000,000.

HELENA, Montana, Dec. 31, 1894.

Merchants' Loan & Trust Co., Chicago, Illinois.

GENTLEMEN: Yours of Dec. 26th received with enclosure as stated. Agreeably to your instructions we have transferred the enclosed stock, and return you herewith three certificates of the Helena National Bank stock, being numbered respectively 356-7-8 for fifty shares each in the name of P. C. Peterson.

In your letter you instruct us to issue two fifty and one twenty certificates. Undoubtedly this was under the assumption of the retirement of one hundred thousand dollars I spoke of in my letter. While we have the order, we have never acted on it by making the formal change, inasmuch as about that time we arranged this consolidation and thought it useless to bother our people twice.

We have issued this stock just as it stands on our books. But, under the new consolidation, the new issue of the First National Bank will be as you suggest, one hundred and twenty shares.

Mr. Ashby is still here in Helena, but I doubt if you could get his concurrence in anything, as he has apparently literally all gone to pieces.

Respectfully.

E. D. EDGERTON,
President of Helena National Bank.

The stipulation or statement of facts then recites (Rec., 11), that "subsequently and prior to April 22, 1895, the consolidation of the Helena National Bank with the First National Bank of Helena was consummated with the consent and approval of the comptroller of the currency, Hon. James H. Eccles," the basis of said consolidation being an allowance to the stockholders in the Helena National Bank eighty per cent. of the face value of their stock in the Consolidated Bank, which took the name of the First National Bank of Helena, and that "on or about May 17, 1895, the certificates representing one hundred and fifty (150) shares of the capital stock of the Helena National Bank standing in the name of P. C. Peterson "were with the consent and under the direc- "tion of the defendant surrendered, and new certificates, "representing one hundred and twenty (120) shares in "the new or Consolidated Bank were issued to said "Peterson in their place." Exhibit I (Rec., 25), is the letter requesting the exchange. The stipulation then says: "These last named certificates have ever since "been and are now in the possession and control of the "defendant and are held by it, *in the same way and for "the same purpose, as the certificates for one hundred "and fifty (150) shares of the capital stock of the Helena "National Bank were originally held, except as the con- "ditions may have been changed by the facts hereinbe- "fore stated,* BUT THAT NEITHER THE DEFENDANT NOR "THE SAID PETERSON *ever took any part in the manage- "ment of either of said banks or participated in the ad- "ministration of their affairs.*" The *italics* of the foregoing quotation from the stipulation, as well as others, are not found in the record. They simply indicate what I regard as *controlling facts* in the present case.

There is also, by the stipulation admitted into the record, as evidence, some correspondence between the defendant and Mr. Ford the assignee of Ashby. Exhibits, "J," "K," "L," & "M." (Rec., 26, 7 & 8.) This correspondence was opened so far as the record shows on October 14, 1895, and ended January 7, 1896. It shows that the assignee of Ashby recognized the right of the defendant to make the changes in the registration of the stock, held by it as collateral security, and the exchange of the shares in the Helena National Bank to the shares in the First National Bank of Helena. Inferentially, and if presumptions can be indulged in, it shows that the receiver had exchanged the unincumbered shares in the Helena National Bank, which came to him as assignee, into shares in the Consolidated Bank, for he says (Exhibit L., Rec., 27), in a letter to the defendant, dated January 4, 1896. "I desire to sell and convert into cash, "in the early spring, the remaining assets of S. C. Ashby "which consist of unimproved real estate in Helena and "forty-eight shares of the First National Bank Stock of "Helena. Before the last dividend is declared, I would "like for you to make disposition for (of ?) the collateral "you hold on the $12,000 loan to Mr. Ashby or entrust "it to me to sell for your benefit. I am now trying to "get an offer on the forty-eight shares I hold. * * * "Kindly let me know if you still hold this stock, and "whether 150 shares of the Helena National Bank or "120 of the First National Bank which number of shares "would be issued to you, in case of transfer.

"Yours truly,

"R. S. FORD, *Assignee.*"

The stipulation further states, as a matter of agreement (Rec., 11, 12), that "all the communications be- "tween the defendant and said banks and their officers, "in any manner relating to said stock and stock certifi- "cates *since* the certificates for one hundred and fifty "shares of stock in the Helena National Bank first came "into the possession of the defendant in the manner and "for the purposes herein stated, have been by corre- "spondence, and the letters and document hereinabove "referred to and made exhibits hereto are an embodi- "ment of all that correspondence with said banks and "their officers and with the assignee of said Shirley C. "Ashby, so far as the same is material *as evidence* on "the hearing of this cause. And the said exhibits are, "and each of them is hereby made a part of this state- "ment."

The remainder of the stipulation contains admissions of formal matters, necessary to the right of the plaintiff to institute and maintain an action as the receiver of a national bank against the stockholders in such bank for the collection of an assessment made by the Comptroller of the Currency against the stockholders in case of the bank's insolvency. About such formal matters there is no controversy. Amongst the matters so admitted is the fact, that Peterson was a confidential employe of the defendant, and that he is without pecuniary responsibility, that the defendant is a corporation with banking and trust powers organized under the laws of Illinois, and doing business in Chicago, that it is accustomed to loan money on stocks in other corporations as collateral security, but for various reasons and amongst others, the possible incurring of a stockholder's liability, it never permitted the stock so held by it to be transferred and registered in its own

name. In this connection the stipulation says, (Rec., 12): "The reasons for this custom were various. Amongst "them may be mentioned *the fact*, that the certificates "are more readily dealt with when so held; that the de- "fendant as a banking corporation, is unwilling to ap- "pear as a stockholder on the books of other corpora- "tions and may not properly assume that position; *that* "*the holding of stock as collateral security is not in fact* "*an ownership of it*, and that in some cases there is a "liability attached to an *apparent, nominal holding of* "*stock*."

Immediately following the above is the admitted fact, that "the defendant is still the holder of the note of the "said Shirley C. Ashby for $12,000, dated April 15, "1893, upon which two partial payments *only* have been "made, both by the assignee of said Ashby, as shown "on the back of said note hereto attached, viz: one for "$1,680 made December 12, 1895, and one for $960, "made October 6, 1896."

It is believed that the foregoing is a fair statement of the case as presented in the courts below, and in both courts the judgment was in favor of the defendant.

Assignment of Errors.

The errors assigned in this court are as follows:

1st. The court erred in holding that the exchange by the defendant in error of stock in the Helena National Bank, held by it in pledge for stock in the First National Bank of Helena, if made without the consent or authority of Ashby, the pledgor, was nevertheless a matter which might subsequently be ratified by him or his assignee, and that such subsequent ratification would relieve the defendant in error of the responsibility of such exchange.

2d. The court erred in holding that the burden of proof was upon the plaintiff in error to establish the fact that the original shares, confessedly held as collateral were wrongfully converted into the new stock without the consent of the pledgor.

3d. The court erred in finding that the agreed statement of facts does not show the wrongful conversion by the defendant in error of the original shares into the new stock without the consent of the pledgor.

4th. The court erred in holding as a matter of law that the letters and other circumstances all indicate that the original shares were not wrongfully converted into the new stock, without the consent of the pledgor.

5th. The court erred in holding as a matter of law that the general finding of the District Court is

conclusive of the question of the wrongful conversion of the original shares by the defendant in error.

6th. Said judgment is erroneous, because it is in favor of the defendant in error, and against the plaintiff in error; whereas, upon the whole record it should have been in favor of the plaintiff in error."

These assignments of error, taken as a whole, invite this court to enter upon an independent examination of the evidence, for the purpose of determining for itself whether or not it would, sitting as a trial court, have reached the same conclusion of fact that was arrived at by the judge of the District Court, before whom the case was originally heard without a jury. The several assignments differ in form, and as they mark the boundaries of the investigation which this court is asked to make, they properly outline the questions which are open to discussion.

Brief and Argument.

I.

The first assignment of error questions the power of Ashby or his assignee to ratify the exchange of the 150 shares of stock, admittedly held by the defendant as collateral security, into the 120 shares of stock of the consolidated bank, known as the First National Bank of Helena. This, so far as it contains a proposition of law, is inadmissible. The universal rule on this subject is, that whatever may be originally authorized, is capable of complete and effective ratification. The power to ratify is commensurate with the power to authorize. There are no special conditions in this case which interfere with the operation of the general rule. The court will note that the exchange into the stock of the First National Bank was made in May, 1895, and that the failure of the bank occurred in September, 1896.

II.

The second assignment of error assumes, as a legal conclusion, that a change of the stock of the Helena National Bank into the stock of the First National Bank of Helena, without the consent of Ashby was, unless explained, a wrongful conversion which made the defendant absolute owner of the stock of the consolidated bank, and liable as a stockholder, to assessments for payment of its debts. Even if the assumption could be admitted,

in the absence of other evidence, then the mere fact that the change was made, the evidence in the case renders it wholly unimportant, and the reason is, that all the evidence is stipulated into the record. It comes in by agreement and without exception. No special responsibility for it rests upon either party. Presumably the trial court considered it all, and weighed it all in arriving at ultimate results. The mere naked fact of change was not before the court; the fact was there with all its attendant circumstances, which the trial court was bound to consider and presumably did. But if we go back to the pleadings, we find the declaration charges that the defendant became the purchaser and owner of the 120 shares of the stock of the First National Bank of Helena and was such owner at the time of the suspension of the bank. This the pleas deny—upon such an issue, where is the burden of proof as to every material fact? It might be admitted that, if the defendant's name appeared upon the books of the bank as a stockholder, the production of the books would make a *prima facie* case against the defendant, and the burden of proof would then be changed; but when the charge of ownership must be made good, if made good at all, through a series of transactions, out of which the inference of ownership is alone to be derived, who has the burden of establishing the fact by a preponderance of evidence? A man is not presumably guilty of murder or larceny, because he is charged with and indicted for the crime. Nor is a man liable to the penalties and obligations of an owner of shares in a national bank unless he is affirmatively shown to be such owner. That he is charged as owner is no evidence of the fact of ownership. We must not forget the elements of legal learning in our anxiety to

reach a desired conclusion. If there has been any departure from such elementary principles of the law and *practice* of the law, in the judgment of any court, the wisdom of it may be open to criticism when it is shown. I should not be willing to claim the benefit of it as a discoverer.

III.

The third, fourth and fifth assignments of error reach the same point by different routes. The substance of them is, if there is any substance to them, that there was no evidence before the trial court which, properly considered, in connection with the reasonable inferences therefrom, justified the finding in favor of the defendant, and that, for that reason, the Circuit Court of Appeals erred in affirming that finding and the judgment entered in accordance therewith.

Two questions are raised by these assignments of error (the sixth assignment may be wholly disregarded) which seem to be the only ones deserving of consideration. They involve the duties and responsibilities of the trial court, and the powers and responsibilities of the Circuit Court of Appeals and of this court, in the exercise of their appellate and supervisory jurisdiction, and may be included in one proposition, viz.:

The duty and responsibility of determining question of fact in cases at law are, by law, devolved upon the trial court, and there is no authority in this court (and this applies to the Circuit Courts of Appeal) to examine the testimony in any case and from it make a finding of ultimate facts.

Such seems to be the settled rule as announced by the authorities.

In *Reed* v. *Stapp*, 52 Fed. Rep., 641, Judge JENKINS, speaking for the Court of Appeals for the Seventh Circuit (p. 644) says:

"This finding is challenged as not sustained by the evidence, and we are urged so to declare. *We have no authority to do that.* Treating the opinion as a special finding, we are only at liberty to consider whether the facts found in law support the judgment. The findings of the trial court upon questions of fact are conclusive—we are not permitted to examine the evidence to ascertain whether the findings of fact be justified. (*Copelin* v. *Insurance Co.*, 9 Wall., 461–467; *The Abbottsford*, 98 U. S., 440–443; *Zeckendorf* v. *Johnson*, 123 U. S., 617.) The review permitted extends only to the question whether the facts found support the judgment rendered. (*Tyng* v. *Grinnell*, 92 U. S., 467.)"

The same doctrine is announced in the case of *Phipps* v. *Harding*, 70 Fed. Rep., 468–470, and the opinion of the Court of Appeals in the present case is to the same effect.

Further citations from the decisions of the Circuit Court of Appeals are not deemed necessary.

In the case of *Lancaster* v. *Collins*, 115 U. S., 222–225, the conclusive adjudication of this court upon this question seems to be authoritatively stated by Mr. Justice BLATCHFORD, in the following language:

"This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff, on the question of variance, or *because there was no evidence to sustain the verdict rendered.*"

In the above case, there was a trial by jury, and the opinion is, therefore, properly limited in its application to cases in which the question of fact is determined by the verdict of a jury. But in the case of *Lehnen* v. *Dickson*, 148 U. S., 71, the question came before the court in a broader way. In that case, as in this, a jury was waived and the cause submitted to the court.

Before stating the conclusions of that case, it is proper to refer again to the fact, that the evidence and the only evidence in the present record is introduced by stipulation of the parties; that the stipulation is not an *agreed case*, nor a substitute for a finding of *ultimate facts*. It was rather a waiver of the formal presentation and identification of evidence, presumably within the control of the parties. Especially is this true of the letters and other papers which are attached as exhibits, and have a bearing upon the entire transaction, the effect of which the stipulation did not pretend to give, and was left as a matter for the determination of the court. In this, the case is in all its features like the case of *Knights of Pythias* v. *English*, 94 Fed. Rep., 369, in which the Court of Appeals for the Eighth Circuit said: "*It is the settled rule of the Supreme Court and the* "*Circuit Courts of Appeal that when a case is tried by a* "*federal judge without a jury the sufficiency of the evi-* "*dence to sustain the general findings of fact cannot be* "*considered by the Appellate Court.*"

It is also proper to call attention to the exact words of the body of the stipulation, which are (Rec., 11): "These last named certificates" (the certificates for 120 shares in the First National Bank of Helena), "*have* "*ever since been and are now in the possession and con-* "*trol of the defendant, and are now held by it in the*

" *same way and for the same purpose as the certificates*
" *for one hundred and fifty (150) shares of the capital*
" *stock of the Helena National Bank were originally*
" *held, except* as the conditions may have been changed
" by the facts hereinbefore stated; but that neither the
" defendant nor the said Peterson ever took any part in
" the management of either of said banks, or participated
" in the administration of their affairs."

From this specific admission the proper conclusion is, that the defendant held the certificates for 120 shares of the capital stock of the First National Bank of Helena as collateral security, precisely the same as it held the certificates for 150 shares in the Helena National Bank, and this construction is supported by the *further admission* (Rec., 12), in the following language:

" The defendant is still the holder of the note of the
" said Shirley C. Ashby for $12,000, dated April 15,
" 1893, upon which two partial payments only have been
" made, both by the assignee of said Ashby, as shown
" upon the back of said note hereto attached, viz: One
" for $1,680, made December 12, 1895, and one for
" $960, made October 6, 1896."

As the fact of those payments is a part of the stipulation it is perhaps immaterial that they do not appear upon the copy of the note set out as Exhibit 1. They were on the exhibit as attached to the stipulation, but were by mistake omitted in the transcript made by the clerk of the District Court.

Both of these payments were made long after the shares of stock in the Helena National Bank had been changed into certificates of stock in the First National Bank of Helena, and time enough elapsed for everybody in inter-

est to be charged with notice of the fact that the change had been made, and yet the payments were made, the *first*, seven months and the *second*, seventeen months after the exchange, by the assignee of Ashby to the defendant as a rightful creditor of Ashby for the full amount of the note.

Returning now to the case of *Lehnen* v. *Dickson*, (148 U. S.), we find it was a case submitted to the trial court without a jury, and that there was on the hearing in the trial court "*no special finding af facts and no agreed statement of facts.*" This appears on page 72. The only formal difference between that case and the present one, which is observable, bearing upon the question now under consideration, is, that in the Lehnen case the testimony was introduced in the ordinary way, and in the present case it came in by stipulation. The stipulation admits certain facts; it also admits as evidence certain letters and documents as proper testimony which the court should consider, simply as evidence, without attempting to give to them and their contents any construction or evidential effect. They, in connection with the facts admitted, were to be considered by the court in the determination of the *ultimate facts* of the case. It is no matter what a stipulation may be called. Its influence must be limited to what it contains. The manner in which legitimate testimony is brought before the court is immaterial unless *the manner* is made the special subject of objection and exception. The stipulation of what is merely evidence into a case does not make the stipulation an agreed case, or an agreed statement of facts. For purposes of illustration merely, it may be stated that counsel for the plaintiff and I never could, in this case, have agreed upon what are

called *ultimate facts*, whilst it was easy for us to agree upon some facts and upon the admissibility of certain letters and documents, *as evidence*, the effect of which should be determined by the court in arriving at its conclusion as to the "*ultimate facts*," to which the law should be applied. In this view of the present case I may be excused for introducing here some extracts from the opinion of this court in the case of *Lehnen* v. *Dickson*, which was without dissent.

At page 72 (U. S., 148), Mr. Justice BREWER, speaking for the court, says:

"There is no special finding of facts, and no agreed "statement of facts. Obviously, therefore, inquiry in "this court must be limited to the sufficiency of the com- "plaint and the rulings, if any be preserved, on questions "of law arising during the trial. Sections 648 and 649, "of the Revised Statutes, while committing generally "the trial of issues of fact to a jury, authorize parties to "waive a jury, and submit such trial to the court, add- "ing that '*the finding of* the court upon the facts, which "may be either general or special, shall have the same "effect as the verdict of a jury.' *But the verdict of a "jury settles all questions of fact.* As said by Mr. Jus- "tice BLATCHFORD in *Lancaster* v. *Collins*, 115 U. S., "222, 225: 'This court cannot review the weight of "evidence, and can look into it only to see whether there "was error in not directing a verdict for the plaintiff on "the question of variance, or because there was no evi- "dence to sustain the verdict rendered.' The finding of "the court, to have the same effect, must be equally con- "clusive, and equally removed from examination in this "court the testimony given on the trial." *Insurance Co.* v. *Folsom*, 18 Wall., 237; *Cooper* v. *Omohundro*, 19

"Wall., 65. Further, section 700 provides that 'When "an issue of fact in any civil case in a Circuit Court is tried "and determined by the court, without the intervention of "a jury, according to section 649, the rulings of the court "in the progress of the trial of the cause, *if excepted to at "the time, and duly presented by a bill of exceptions*, may "be reviewed by the Supreme Court upon a writ of error, "or upon appeal; and when the finding is special, the re- "view may extend to the sufficiency of the facts found to "support the judgment.' Under that, the rulings of the "court in the trial, *if properly preserved*, can be reviewed "here, and we may also determine whether the facts as "specially found support the judgment; *but if there be "no special findings*, there can be no inquiry as to wheth- "er the judgment is thus supported. *We must accept the "general finding as conclusive upon all matters of fact, "precisely as the verdict of a jury. Martinton* v. *Fair- "banks*, 112 U. S., 670.

"It is true, if there be an agreed statement of facts "submitted to the trial court and upon which its judgment "is founded, such agreed statement will be taken as the "equivalent of a special finding of facts. *Supervisors* v. "*Knenicott*, 103 U. S., 554. Doubtless, also, cases may "arise in which, without a formal special finding of facts, "there is presented a ruling of the court, *which is dis- "tinctly* a ruling upon a matter of law, and *in no manner* "a determination of facts, or of inferences from facts, "in which this court ought to and will review the ruling. "Thus in *Insurance Co.* v. *Tweed*, 7 Wall., 44, where "on the argument in this court counsel agreed that cer- "tain recitals of facts made by the trial court in its opin- "ion or 'reasons for judgment,' as it was called, were the "facts in the case, and might be accepted as facts found

" by the court, it was held that, as they could have made " such agreement in the court below, it would be accepted " and acted upon here, and the facts thus assented to would " be regarded as the facts found or agreed to upon which " the judgment was based; and upon an examination it was " further held that they did not support the judgment, " and it was reversed. But still, as was ruled in *Flan-* " *ders* v. *Tweed*, 9 Wall., 425, this court is disposed to " hold parties to a reasonably strict conformity to the " provisions of the statute prescribing the proceedings " in the case of a trial by the court without a jury; *and* " *no mere recital of the testimony*, whether in the opin- " ion of the court or in a bill of exceptions, can be deemed " a special finding of facts within its scope. *Norris* v. " *Jackson*, 9 Wall., 125. See also the case of City of " New York, 147 U. S., 72, in which the rule, as appli- " cable to suits in admiralty, was reviewed and similar " conclusions were reached."

After considering certain features of the case then before the court, the opinion (p. 77) proceeds:

" But the burden of the statute is not thrown off sim- " ply because the witnesses do not contradict each other, " and there is no conflict in the testimony. It may be " an easy thing in one case for this court, when the testi- " mony consists simply of deeds, mortgages, or other " written instruments, to make a satisfactory finding of " the facts, and in another it may be difficult, when the " testimony is largely in parol, and the witnesses directly " contradict each other. *But the rule of the statute is* " *of universal application.* It is not relaxed in one case " because of the ease in determining the facts, or rigor- " ously enforced in another, because of the difficulty in " such determination. *The duty of finding the facts is*

" *placed upon the trial court. We have no authority to* " *examine the testimony in any case, and from it make* " *a finding of the ultimate facts.* Neither in this case " can that be said to be wholly an inconsequential mat- " ter upon which the witnesses differ. It may not be of " controlling importance, yet it bears largely on the ques- " tion *of the good faith* of Lennen in taking the lease " from Kempinski. With reference to the language of " Judge THAYER, it is obvious that no such significance as " is claimed can be given to the words 'after stating the " facts as above.' Reading the prior statement, it would " seem to be only a succinct recital of the material testi- " mony in the case. *Norris* v. *Jackson*, 9 Wall., 125."

In *Martinton* v. *Fairbanks*, 112 U. S., 670 (a case referred to with approval in the opinion from which the above quotations are made), this court, speaking by Mr. Justice WOODS, and without dissent, said (p. 671):

" During the trial a bill of exceptions was taken which " simply set out all the evidence in the case and closed " as follows: 'Which was all the evidence offered in said " causes; on which evidence the court found for the plain- " tiff in the sum of $11,209, and entered judgment ac- " cordingly, to all of which said defendant then and there " excepted. And, as said facts aforesaid do not appear " of record, this bill of exceptions is prepared, and we ask " that the Judge may sign and seal the same, and it is " done accordingly.' "

" There was no demurrer to the declaration or other ex- " ception to the sufficiency of the pleadings, no exceptions " to the rulings of the court in the progress of the trial, " in the admission or exclusion of evidence, or other- " wise, no request for a ruling upon the legal sufficiency or

"effect of the *whole evidence*, and there was no motion in "arrest of judgment. The only matter presented by the "bill of exceptions which this court is asked to review, "*arises upon the exception to the general finding by the "court for the plaintiff, upon the evidence adduced at the "trial.* The defendant in error insists that, upon this "state of the record, no question of law is presented which "the court here can review.

"We think this contention is well founded. The pro- "visions of the acts of Congress which relate to the trial "of issues of fact by the court are found in the act of Sep- "tember 24, 1789, 'An act to establish the judicial courts "of the United States.' * * * The provision in the "act of 1789 is reproduced in § 1,011 of the Revised stat "utes, as follows: 'There shall be no reversal in the Su- "preme Court or in any Circuit Court upon a writ of error "* * * for any error of fact." The provisions of the "act of 1865 are reproduced in §§ 649 and 700 of the Re- "vised Statutes, as follows: Sec. 649. "Issues of fact "in civil cases in any Circuit Court may be tried and de- "termined by the court without the intervention of a jury, "whenever the parties or their attorneys of record file with "the clerk a stipulation in writing waiving a jury. The "finding of the court upon the facts, which may be either "general or special, shall have the same effect as the "verdict of a jury."

After further citing the provisions of the statute, the opinion (p. 672) proceeds:

"§§ 649 and 700 were first fully construed by this court "in *Norris* v. *Jackson*, 9 Wall., 125. The court in "that case, speaking by Mr. Justice Miller, laid down "the following propositions: '(1.) If the verdict be the

" general verdict, only such rulings of the court *in the* " *progress of the trial* can be reviewed as are presented " by bill of exceptions, or as may arise on the pleadings. " (2.) In such cases *a bill of exceptions cannot be used* " to bring up the whole testimony for review any more " than in a trial by jury. (3.) That if the parties desire " a review of the law involved in the case, they must " either get the court to find a special verdict, which " raises the legal propositions, or they must present to " the court their propositions of law and require the " court to rule on them. (4.) Objection to the admis- " sion or exclusion of evidence, or to such ruling on the " propositions of law as the party may ask, must appear " by bill of exceptions.' These propositions have been " persistently adhered to by this court. Thus, in *Miller* " v. *Insurance Co.* 12 Wall., 285, 297, it was said: 'The " finding of the court, if general, cannot be reviewed " in this court by bill of exceptions or in any other " manner.'

" In *Insurance Company* v. *Folsom*, 18 Wall., 237, the " court said: ' Where the finding is general, the parties " are concluded by the determination of the court, ex- " cept in cases where exceptions are taken to the rulings " of the court in the progress of the trial. * * * Where " a case is tried by the court without a jury, the bill " of exceptions brings up nothing for revision except " what it would have done had there been a trial by " jury."

After citing various other authorities, the opinion further says (p. 173):

" The proposition that the general finding of the court " in this case is open to review is in direct opposition to

" the rulings of the court in the cases cited. The plaint-
" iff in error seeks to make the question whether the
" evidence set out in the bill of exceptions justified the
" finding by the court for the plaintiff, on the issue of
" fact raised by the pleadings. This is, in defiance of
" the decision of this court that it can not be done, an
" attempt upon a general finding to bring up the whole
" testimony for review by a bill of exceptions.

" The theory of the plaintiff in error seems to be that
" the general finding in this case, like a general verdict,
" includes questions of both law and fact, and that, by
" excepting to the general finding, he excepts to such
" conclusions of law as the general finding implies. But
" § 649, Revised Statutes, provides that the finding of
" the court, whether general or special, shall have the
" same effect as the verdict of a jury. *The general ver-*
" *dict of a jury concludes mixed questions of law and*
" *fact*, except so far as they may be saved by some ex-
" ception which the party has taken to the ruling of the
" court upon a question of law. *Norris* v. *Jackson*, *ubi*
" *supra*. But the plaintiff in error has taken no such
" exception. By excepting to the general finding of the
" court, it is in the same position as if it had submitted
" its case to the jury, and, without any exceptions taken
" during the course of the trial, had, upon a return of
" the general verdict for the plaintiff, embodied in a bill
" of exceptions all the evidence, and then excepted to the
" verdict because the evidence did not support it."

Other parts of the opinions of this court above referred to might be added, but the quotations made are deemed sufficient for the purposes of the present case. There are here no exceptions to any of the proceedings had in and before the trial court. There was no request for

special findings to be made by that court. There was no motion before the trial court which challenged in any way the sufficiency of the evidence to justify a finding in favor of the defendant, or which asked the court peremptorily to find in favor of the plaintiff. The only exception was a general one to the conclusions of the court. Under the rulings of this court set forth in the cases above referred to, and the authorities therein cited, there was nothing left upon the record, as made in the trial court, for the Circuit Court of Appeals to reconsider or review; and, therefore, this court, according to the rule which it has conclusively established, has no authority to re-examine the evidence involved in the general finding of the trial court as to the facts; and, therefore, has no basis upon which to review the findings upon questions of law.

Further authorities upon this question are not regarded as necessary, for the law as thus established has not been departed from so far as I am advised.

IV.

IF THE OBJECTIONS TO THE AUTHORITY OF THIS COURT IN THE PRESENT CASE TO REVIEW AND CONSTRUCT FOR ITSELF A THEORY OF THE FACTS, SHOULD NOT BE SUSTAINED, THEN IT IS INSISTED THAT, UPON THE MERITS, THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED, ON THE GROUND THAT THE DEFENDANT NEVER WAS THE OWNER BY PURCHASE OR OTHERWISE, OF THE 120 SHARES OF STOCK OF THE FIRST NATIONAL BANK OF HELENA, REFERRED TO IN THE PLEADINGS, OR LIABLE TO AN ASSESSMENT AS SUCH, WITHIN THE MEANING OF THE NATIONAL BANKING ACT AS CONSTRUED BY THIS COURT.

It is unnecessary to spend any time over the proposition that the 120 shares of stock referred to never stood upon

the books of the bank in the name of the defendant. It is not pretended that they ever did, and as a consequence of this, that technical cause or source of liability, which rests upon the mere fact of registration or representation, is entirely withdrawn from consideration.

The question of ownership is always a question of fact, and the responsibilities imposed by law upon ownership do not attach until the fact of ownership has been established. The intention of parties dealing with property and property rights enters largely into the fact of ownership. The concurrent intention of the parties converts an absolute deed into a mortgage, or a bill of sale into a pledge. It is the agreement and mutual understanding which fixes their relations to the subject-matter of their business transactions, *and in the absence of fraud, third parties cannot change those relations for their own advantage.* The transaction between the defendant and Ashby, by which the former received the stock of the Helena National Bank in pledge as collateral security for an actual loan of money, was morally and legally unobjectionable. It was recognized in the assignment made by Ashby, in the following Ju[illegible] exactly as it was made, viz: *as a pledge of the stock.* The assignee Ford, was, therefore, by the very instrument of assignment which he held, advised of the relations of the defendant to the certificate of shares in the Helena National Bank. He cannot claim, nor can the plaintiff claim ignorance of those relations. They are also recognized by the two banks and by the assignee in their correspondence with the defendant down to the latest item of that correspondence which the record contains; and this applies as well to the 120 shares of the stock of the First National Bank of Helena, which by consolidation absorbed the Helena National

Bank as to the 150 shares originally pledged by Ashby. As has already been shown Ashby resided at Helena, Montana, and the 150 shares of the Helena National Bank stock stood in his name upon the books of the bank, whilst all the preliminary steps for the reduction of the stock of that bank and for the consolidation of the two banks were in progress. Presumably he had notice of those proceedings, and as a registered stockholder he was the party to be served with notice respecting those proceedings up to the very time of their practical completion; for such changes in bank organizations are not made without notice to registered stockholders. Whatever Ashby's personal disabilities or failings may have been, as shown in the letters of Edgerton heretofore referred to (and they certainly seem to have been bad enough) he would still have been entitled to notice of those changes, and if he or any one claiming under him had any disposition, either from bad or good motives, to resist the proposed changes with respect to the 150 shares of stock held by the defendant as collateral, he should have notified the defendant who was two thousand miles away from the scene of those transactions, against submitting to the changes which were in contemplation. No such notice was ever given. No steps of any kind in recognition of the changes were ever taken by the defendant until it was advised that the transactions had been practically agreed upon and only formal action was required to make them complete. The defendant was left to act upon its own judgment of the situation and upon the understanding clearly expressed in the letters of Edgerton, the president of the banks, that the changes had practically been made *with the consent and under the author-*

ity of the controller of the currency. All parties in interest outside of the defendant, who held the stock as pledgee, seem to have consented to the changes which were in fact made. There does not appear from the record to have been any dissent of any stockholder in the National Bank of Helena to those changes. The Helena National Bank, although its stock was impaired, was yet presented to the defendant as a solvent institution, and improving in its conditions. By the reduction of its capital, directed by the controller of the currency, the 150 shares which the defendant held as a collateral was practically reduced to 120 shares of the stock of that bank. Of the First National Bank of Helena, prior to the consolidation, no complaint had ever been made, so far as the record shows, and the two banks were consolidated with the consent of their stockholders generally but *without the participation of the defendant, or of Peterson,* in whose name the shares then stood, upon the basis of the par value of their shares respectively, the reduction in the capital stock of the Helena National Bank being at that time deemed a fixed fact. It is not readily perceived what fault the defendant committed under such circumstances, in surrendering the shares in the Helena National Bank which it held as collateral, and taking in exchange therefor the certificates representing 120 shares in the consolidated bank, which by the judgment of all parties in interest was the representative value of the Helena National Bank stock in the consolidation. The change was a mere formal one, so made and so understood. The changes which had been made at that time, rendered the certificate of shares in the Helena National Bank ineffectual for many purposes for which such certificate in going institutions are deemed available. The exchange

was necessary to give currency to whatever there was of value in the old certificates. It was a thing authorized, if not commanded, to give full effect to what the law, the ministers of the law and the parties in interest had actually done. The new certificate was the old thing in better and more available form. The exchange was neither a sale nor a conversion in any proper signification of those terms. The defendant held the original certificates for a special purpose, with full authority to represent them and make them available for that purpose. What it did, it did for the benefit and protection of its security, and nothing more, and it may be safely added, as a matter challenging belief, that it held the new certificates in the same way and for the same purpose that the old ones were held, and that all parties in interest so understood it, as shown by the correspondence between them. The defendant never made any claim of absolute ownership in the certificates. If Ashby or his assignee had deemed it advisable at any time to redeem the certificates by paying the debt for which they had been pledged, it is not within the range of possibility that the defendant would have pretended that the changes through which the security had passed had resulted in any change in the relation of the parties to the security itself, or that any court would so have held if the question had been submitted to it. The defendant simply wanted its money. Its correspondence bears no other construction. It never purchased this stock in any of its forms, and never executed the power of sale contained in the collateral note, which it certainly would have done if it had intended to acquire the stock in real ownership.

If this analysis of the situation is the right one, and this is confidently insisted upon, then the only other ques-

tion to be considered is, can a party holding certificates of shares in a national bank simply as a pledgee or as collateral security for a debt owing to him, and in whose name the stock never has been registered upon the books of the bank, be held to the liabilities of an actual stockholder under the provisions of the National Banking Act? The decisions of this court, as I understand them, answer this question in the negative. That such a holder of share certificates is not the real owner of the shares is a proposition which need not be discussed separately, as it is disposed of by the same authorities which will be referred to upon the main question.

It may be seriously doubted, in view of the more recent decisions of this court, whether the decision in the case of *National Bank* v. *Case, receiver*, 99 U. S., 623, would be repeated to-day under the same conditions. The fact that the bank, in that case, caused the transfer to be made to Waldo, one of its clerks, within a few hours after the shares had been registered in its name, *for the purpose* of avoiding the liability of a stockholder, is of no consequence in itself, under more recent decisions, if it had not already incurred the liability of a stockholder by causing the stock to be registered in its own name. The transient and, probably, accidental registration of the stock in the name of the bank, injured no one and conferred no additional rights and should not have entailed unexpected responsibilities. The holder of national bank *stock as security* is not bound to assume the responsibility of an actual stockholder and may rightfully evade it. It was the fact, however, in that case, that the National Bank took upon itself the apparent ownership of the stock, by causing it to be registered in its own name, and that mere fact determined the result

in that case. There is no such fact in the present case, and, therefore, it is not necessary for my client's protection that I should have or enter into any further controversy with that judgment. I may, however, call attention to another questionable statement contained in the opinion of Mr. Justice STRONG, to the effect that the holder of shares as collateral security, who permits himself to appear upon the books of the corporation as a stockholder, thereby *releases* the former owner from his liability as a stockholder. It has since been held, and upon better consideration of the provisions of the National Banking Act, as will be hereafter seen, that the holder of shares in a national bank as security simply, is not the real owner, and that the pledgor of the shares remains such real owner so long as the pledge is in force, and that simple change of registration does not relieve the real owner from the statutory liability as a shareholder. But, however this may be, the case at bar is readily distinguishable by the absence of the substantial fact which determined the judgment in the case of the *National Bank* v. *Case;* for neither the stock of the Helena National Bank, nor the stock of the First National Bank of Helena, was ever registered or appeared upon the books of either bank, in any way, in the name of the defendant.

The case of *Anderson, receiver*, v. *Philadelphia Warehouse Company*, 111 U. S., 479, may be referred to as analagous, in all important features, to the case now before the court, and the results of it as decisive against the claims of the plaintiff. The opening paragraph of the opinion in that case states in clear terms the law applicable to and controlling in this case, as well as in that. It says:

" It is well settled that one who allows himself to ap-
" pear on the books of a national bank as an owner of its
" stock is liable to creditors as a shareholder, whether
" he be the absolute owner or a pledgee only; and that,
" *if a registered owner acting in bad faith*, transfers
" his stock in a failing bank to an irresponsible person,
" for the purpose of escaping liability, or if his transfer
" is colorable only, the transaction is void as to cred-
" itors. *National Bank* v. *Case*, 99 U. S., 628. *Burton*
" v. *Johnson*, 107 U. S., 251. *It is, also, undoubtedly*
" *true, that the beneficial owner of stock* registered in
" the name of an irresponsible person may, under *some*
" *circumstances*, be liable to creditors as the real share-
" holder, *but it has never, to our knowledge, been held*
" *that a mere pledgee of stock is chargeable where he is*
" *not registered as owner.*"

At page 483 the opinion further says:

" There is in this case no evidence of actual fraud or
" bad faith. *The Warehouse Company never was the*
" *owner of the stock in question, and never held*
" *itself out as such.* The transfer of Kern and Blumer
" & Co., was only by way of pledge, and the Company
" was bound to return the stock whenever the debt, for
" which it was held, should be paid. From the verdict
" of the jury, under the instructions of the court, it must
" be accepted as a fact, that the Company never con-
" sented to a transfer of the stock to its name, or to that
" of its president, and it is undisputed that, for seven
" years before the failure of the bank, and at least five
" years before its embarrassments were known to the
" Company, or the public, the stock had been standing,
" with the assent of Kern, Blumer & Co., and the officers

"of the bank, in the name of McCloskey or Ferris. Dur-
"ing all that time, neither the registered holders, nor the
"Warehouse Company, claimed any dividends or in any
"way acted as shareholders. On the contrary, either Kern
"or Blumer & Co., took the dividends, and to all intents
"and purposes controlled the stock." (In the present case there were no dividends, and except as stated nothing was ever done with the stock by any one). "There
"was no concealment on the part of the Warehouse
"Company, and no effort to deceive. It had possession
"of the certificates which represented the stock, with
"full power to control them for all the purposes of its
"security, but there was never a time, from the date of
"the original transfer by Kern on the books, until the fail-
"ure of the bank, that it was or pretended to be anything
"else than a mere pledgee. Those who examined the
"list of shareholders would have found the name of Mc-
"Closkey or Ferris as the registered holder of 450 shares.
"There was nothing on the books of the bank to con-
"nect them or either of them with the Warehouse Com-
"pany as a shareholder. If inquiries had been made and
"all the facts ascertained, it would have been found that
"either *Kern or Blumer & Co. were always the real*
"*owners of the stock*, and that it had been placed in the
"name of the persons whose names appeared on the
"registry, not to shield any owner from liability, *but to*
"*protect the title of the company as a pledgee.* * * *
"The avowed purpose of both transfers was to give the
"company the control of the stock for the purposes of
"its security, *without making it liable as a registered*
"*stockholder.* To our minds there was neither fraud
"nor illegality in this. *The company perfected its*
"*pledge without making itself liable as an apparent*

" *owner.* Kern or Blumer & Co. *still remained the* " *owners of the stock,* though registered in the name of " others, and pledged as collateral security for their debt. " * * * *The security of the Warehouse Company* " *was perfected without imposing on the company a* " *stockholder's liability.* All this was done in good " faith, when the bank was in good credit and paying " large dividends, and years before its failure or even its " embarrassment. So far as the company was concerned, " *the transfer was not made to escape an impending* " *calamity, but to avoid incurring a liability it was un-* " *willing to assume, and which it was at perfect liberty* " *to shun.*"

In the case of *Pauly* v. *State Loan & Trust Company,* 165 U. S., 606, all the cases of importance theretofore decided in this court bearing upon the liabilities of shareholders in national banks, are considered and carefully analyzed by Mr. Justice Harlan, and various conditions are stated with conclusions appropriate thereto, the last one being as follows (p. 619):

" That if one receives shares of the stock of a national " banking association as collateral security to him for a " debt due from the owner, with power of attorney au- " thorizing him to transfer the same on the books of the " association, and, being unwilling to incurr the respon- " sibilities of the shareholder as prescribed by the statute, " causes the shares to be transferred on the books to " another, under an agreement that they are to be held " as security for the debt due from the real owner to the " creditor, the latter acting in good faith, and for the " purpose only of securing the payment of that debt " without incurring the responsibility of a shareholder,

"*he, the creditor, will not*, although the real owner may "be treated as a shareholder within the meaning of sec- "tion 5,151."

The case of *Robinson* v. *Southern National Bank*, recently decided in this court and reported in the advance sheets of "All Opinions of the Supreme Court of March 15, 1901," may properly be referred to as illustrative of acts of active interference by the holder of shares of stock in national banks as pledgee and for purposes of security only, affecting the status or ownership of such shares *without incurring thereby* the liability of a stockholder. The facts in that case were widely different from those here presented, but the principle underlying the decision of the case would seem broad enough for the full protection of the present defendant. It may be added here that it is impossible to charge the defendant in this case with any fraudulent act or improper intention. The mere mistake, if there was one, in the exercise of an apparent authority, coupled with an interest, may furnish cause for setting aside the act and imposing such damages as have naturally resulted therefrom; but it would be cruelty in courts to impose upon the accident of a mistake the punishment of intentional and premeditated wrong-doing. It cannot be claimed upon this record that the defendant ever intended to become the owner of the stock in either of the Helena banks, or that it ever acted in such a way as to indicate to others that it so intended. It did nothing which can be regarded as legally inconsistent with the continuous holding of the certificates of shares as collateral security only, and the two courts to which the case has already been submitted have so decided. It is respectfully submitted that no reason can be shown why these decisions should be reversed.

V.

It is certainly proper, if not necessary, to make some reference to the brief and argument of counsel for plaintiff in this case, which has been just received. It may be said of it preliminarily that the *whole argument assumes* as a matter of fact fully established that the defendant held the shares of stock in the consolidated First National Bank of Helena as a purchaser and real owner. This assumption is in direct conflict with the conclusions of the trial court as the logical result of the entire evidence in the case. The general finding of the trial court necessarily involved the question of the real ownership of the 120 shares of the capital stock of the First National Bank of Helena. The general finding could not have been made without a determination of that question, and that question was settled and determined by the evidence before the court. That determination was a necessary precedent to the judgment in favor of the defendant. To treat the case now from the standpoint that that general finding amounted to nothing, would be to abandon the entire case as it now stands, and begin a trial of it *de novo* in this court. If the premises assumed by plaintiff's counsel were to be admitted, a different argument on the part of the defendant would be justified. It is the premises of the counsel that are denied, and not his conclusions of law derived from such premises. This is illustrated in every point which the counsel has made, and taking them in their order, he asserts as his first point that "the 120 shares of stock were held by P. C. Peterson "as agent for the defendant in error, and defend-"ant in error is liable for any assessments which he

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"might be called upon to pay." This proposition assumes that the defendant was the real owner of the stock, fraudulently covering up that ownership under the name of P. C. Peterson. Under that proposition he cites the cases of *Davis, receiver*, v. *Stevens*, 17 Blatchford, 259; *Case, receiver*, v. *Small*, 10 Fed. Rep. 722; *Hubbell* v. *Houghton*, 86 Fed. Rep., 547 and *Houghton* v. *Hubbell*, 91 Fed. Rep., 453, the same case as above referred to on appeal to the Circuit Court of Appeals. In each of these cases, it appeared as an established fact that the persons sought to be charged as stockholders in national banks were the actual and real owners of the stock, and were covering up their actual ownership under the names of their agents or representatives, and fraudulently attempting to conceal their real ownership. It is unnecessary to examine those cases in order to show the difference between the facts there before the court, and the facts here presented. In those cases the parties, who appeared as registered owners of the stock represented a real ownership. In the present case, Peterson, as trustee, represented the claims of all parties in interest, and the defendant *only as a pledgee*, or the holder of the stock as collateral security, and this the general finding of the trial court conclusively established.

The second point of the brief and argument of plaintiff's counsel, namely: "The shares of stock in controversy are not and never were held by the defendant in error, or P. C. Peterson, as pledgee," is answered by the foregoing statement.

The third point made in the brief of plaintiff's counsel is a positive assertion that "By the exchange of the stock "in the Helena National Bank originally pledged for the "shares of the First National Bank, the defendant in er-

" ror became, for the purposes of this action, the real " owner of the shares so received in exchange."

This, also, is an assumption *against the findings of the trial court*, as to the fact of ownership of the stock—a fact to be determined by an examination of the entire evidence in the case, and which was a matter peculiarly and exclusively within the jurisdiction and control of that court. The reference to section 5139 of the Revised Statutes of the United States does not help out the assumption of counsel, for it simply says that " Every person becoming a shareholder by such transfer, shall in proportion to his shares succeed to all the rights and liabilities of the prior holder of such shares."

A real holding and a real ownership of the shares, and not a mere holding as collateral security, must be regarded as a necessary condition to the effective operation of that provision of the statute.

The cases of the *National Bank* v. *Case*, 99 U. S., 628; *Anderson* v. *Philadelphia Warehouse Company*, 111 U. S., 479, and *Pauly* v. *State Loan & Trust, Company*, 165 U. S., 606, have all been considered in this argument.

The quotation made by the counsel for plaintiff (page 21) from the opinion of the court in the last named case relates solely to cases where there is either an admitted or an established real ownership of the stock in controversy, and he omits entirely the clause of that opinion which applies to the case now before the court, where the question of fact as determined by the finding of the trial court, is that the defendant simply held the stock as pledgee and for purposes of collateral security.

It may not be contended that in the decision of the

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various cases referred to by counsel, this court was not seeking to reach a conclusion as to the real standing of the parties in interest; but it may be fairly said, as the result of the cases, that no conclusion was reached in any of them which would justify a reversal of the judgment in the present case, on the ground that the defendant was the real owner of the 120 shares of stock in the First National Bank of Helena, *contrary to the finding of the trial court.*

The cases referred to by counsel in his brief which concern the powers of assignees under voluntary assignments to exchange and convert into other and different securities or property the assets which they hold as such assignees, are not here pertinent, and especially for the reason, that in all those cases, there were or seemed to have been complete transformations of properties or property rights; that is to say, a substitution of one thing for an entirely distinct and separate thing with which the former had no connection, where the only legitimate power, which the assignee could exercise, was to convert the property as originally received by him into money, and where no discretion was allowed to the assignee to do anything except as authorized by the letter of the assignment made to him, and where he acted solely as a *naked trustee*, without personal interest. In such cases, the law holds the trustee to a very strict accountability, and allows to him no latitude of discretion. The holder of property of a changeable value, as collateral security, is not held to the strict accountability of a naked trustee. The interest which he has in the property, as the holder of it as security, confers upon him the power to deal with it for the protection of his interest as a pledgee, and the law will only hold him accounta-

ble for the exercise of reasonable judgment in the execution of that authority. He may do that in reference to the pledge, which good business judgment for the time, might deem reasonable, *unless otherwise directed by parties ultimately interested as owners of the pledge*, and there is nothing in this record which shows, or tends to show, that in the acts done by the defendant in respect to the stock pledged to it as collateral security, it did not follow the dictates of good judgment for the protection of that pledge. It did exactly, so far as this record shows, what all the absolute owners of stock in the National Bank of Helena did for the benefit and protection of their own personal interests. The simple matter of taking certificates of shares in the consolidated First National Bank of Helena, in place of the certificates for the shares in the Helena National Bank, was not a swapping or an exchange of property or property rights, or a shifting of one thing into another thing. There was a legalized continuity between the two classes of certificates; both represented the same substantial interest, if there was any substantial interest to be represented by either.

The case of *Stewart* v. *Bigler's assignees*, 98 Pa. St., 80, as cited by counsel for plaintiff, has no bearing upon the present case. The question there, as stated by the counsel, was one of damages between the assignee of the pledgor and the pledgee, growing out of an exchange of securities, a question very different in all its features from the one here presented.

I do not deem it necessary to follow the suggestions of counsel in respect to the provisions of the National Banking Act upon the question of consolidation. Such consolidations are a part of the history of the operation of the national banking law.

Consolidations have been effected with the sanction of the Comptroller of the Currency in numerous instances involving large substantial pecuniary interests. The executive officers of the Government and the courts have recognized such consolidations as legitimate. It may be, but the question is unimportant for present purposes, that a single objecting stockholder could prevent such a consolidation by placing himself in opposition to the business judgment of every other stockholder, and putting himself in the position of a blackmailer; and it is possible that the holder of shares in a national bank, simply as collateral security, could put himself in that position and compel all the other stockholders to yield to his blackmailing propositions. The question, so far as it concerns this case, is simply this: Does good judgment, good faith and the exercise of a reasonable discretion, demand of the holder of shares in national banks simply as security, to undertake such a fight with all the real stockholders, *without any suggestion from the real owner* that he is expected or desired to take such a position? I leave the whole question upon this suggestion.

One further remark upon this part of counsel's brief may be pertinent, namely: The defendant is not responsible for the floating condition of the absolute ownership of the stock which it received and held as collateral security. It is sufficient for its protection in this case, that it is not responsible for that condition, but upon the whole record it may safely be said, that Ashby or his assignee have always continued to be the real owners of the shares of stock which the defendant held and holds as collateral security; that Ashby is insolvent, and otherwise disreputable, as the

letters of Edgerton seem to import, and that Mr. Ford, as assignee of Ashby, is probably not liable as a stockholder, is not the fault of the defendant.

The fourth point of counsel's brief and argument (p. 30), is simply a continuation of the assumption that the exchange of the stock of the Helena National Bank into the stock of the consolidated First National Bank of Helena, was a sale of the stock which the defendant held as collateral security. It was conclusively determined against this assumption by the general finding of the trial court, still he proceeds to argue upon that basis, and arraigns the opinion of the Circuit Court of Appeals upon that subject. The whole argument may well be dismissed from consideration by the suggestion, that the opinion of the Circuit Court of appeals is not here legitimately under review, nor is the defendant bound or concluded, in any way, by the reasons which the Circuit Court of Appeals may have given for its conclusions. It would be an innovation upon the practice of Appellate Courts, if errors can now be assigned upon the reasons given by the lower court for its conclusions. It is said to have been amongst the instructions given by Charles II to an appointee to a judicial office in the American colonies, that he should give his conclusions without reasons therefor. All appellate jurisdictions would be inextricably involved in controversies, if the reasons assigned by inferior courts were allowed to be matters of exception and argument. This is not said as indicating any imperfection in the reasoning of the opinion of the Circuit Court of Appeals in this case, but simply as an indication of what is deemed to be the relations of such opinions to the hearing of the cause in the Appellate Court.

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There is a broad distinction between *a liability to damages for the maladministration of a trust and the assumption of the liabilities of an actual stockholder* under the national banking law.

In inviting the attention of the court to Edgerton's letter (Rec., 14–18) counsel is simply asking this court to place itself in the position of a trial court, and review the findings of that court upon the evidence. He makes his own analysis and draws certain conclusions from that letter and apparently reaches a conclusion satisfactory to himself that the consolidation of the two banks was disadvantageous to the interests of the shareholders in the Helena National Bank. He forgets, however, that this letter and all it contained with other evidence was before the trial court and the effect of it presumptively duly considered in the general finding.

It may not be necessary, but is somewhat interesting to follow out the reasoning of counsel from the conclusion he seems to have reached from his analysis of the Edgerton letter. He says (Brief, 29): "Those statements of the then president of the Helena National "Bank, being the same person who in May, 1895, received from the defendant in error *its stock* in the "Helena National, standing as they do as a part of the "agreed statement of facts undisputed and in no manner qualified, seems to justify the conclusion that at "that time the stock was of the value named, and that "had the defendant in error refused to accept the exchange, it would have received a consideration sufficient to have liquidated the debt of Ashby.

"It may be said that this is a matter with which we "have no concern in this case, but when it is considered

" that had such sale of the stock been made, the one " hundred and twenty shares of the stock in the First " National, received by the defendant in error and by its " ' rection placed in the name of P. C. Peterson, on the " ' ›ks of the bank, would have continued the property " ' Edgerton or some of the parties in the consolida- " tion scheme and thus, upon the insolvency of the First " National Bank which followed nine," (it should be *sixteen*), " months later the receiver would not have " been obliged to meet the question here presented and " would not have been required to scour the country to " find an owner of this stock, but would have proceeded " directly to enforce the assessment against Edgerton or " such of his associates as held the particular stock in " controversy, it becomes a question of vital and con- " trolling importance."

All this simply means that if the defendant, holding the stock of the Helena National Bank as collateral security, had in opposition to the judgment of real owners and holders of the stock of that bank, obstinately and without apparent reason and without any suggestion or request so to do from the real owners, constituted itself an obstructionist to the scheme of consolidation and a blackmailer upon the rights of others it might have forced somebody to pay the debt of Ashby, and thereby made that " *somebody* " liable to the receiver of the bank in a proceeding like the present one.

It would seem to be reasonable to assume, that the court would excuse the recital of the numerous contingencies which would surround the possible successful execution of the plan, thus presented in the line of compelling somebody to assume a liability for which, under existing circumstances, there was no *responsible* party. It is,

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perhaps, well understood in the profession, that a defendant who pleads *misnoner* in a civil suit, by way of *abatement*, must furnish in his plea, his right name in order that a better writ may issue. *It has never* been *decided*; that a party sued as defendant and specifically, by plea in bar, denying his own liability, must by subterfuges and against business judgment, provide a party, who should respond to the liability, with which he is charged in the pending proceedings.

If any question as to Peterson's liability could be raised upon this record, for any purpose connected with this case, reference might properly be made to the case of *Turnbull* v. *Payson*, 95 U. S., 418, in which this court, speaking by Mr. Justice CLIFFORD (page 421), says:

"When the name of an individual appears on the "stock book of a corporation as a stockholder, the *pri-* "*ma facie* presumption is that he is the owner of the "stock, in a case where there is nothing to rebut that "presumption; and in an action against him as a stock- "holder, the burden of proving that he is not a stock- "holder, or of rebutting that presumption, is cast upon "the defendant."

That Peterson was not a stockholder in any reasonable interpretation of that term, does not seem to admit of question. He was merely a custodian, depository or stakeholder, a naked trustee for the benefit of all parties in interest.

The case of *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S., 479, and the conclusion arrived at by this court upon a careful review of all the cases in *Pauly* v. *State Loan and Trust Co.*, 165 U. S., 606, 619, hereinbefore referred to, sufficiently answer any suggestion,

which may be made in that direction, for the purpose of this case.

For the reasons presented, it is respectfully submitted, that the judgment of the Circuit Court of Appeals should be affirmed.

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Of Counsel for Defendant in Error.